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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD G. BROWN,

Defendant and Appellant.

H027038

(Santa Clara County

Super. Ct. No. CC266585)

Pursuant to a plea bargain, Richard G. Brown, pleaded no contest to one count of committing a lewd act on a minor under the age of 14 years. (Pen. Code § 288, subd. (a).)¹ Defendant received a sentence of three years in state prison, and the trial court imposed a restitution fine of \$600. (§ 1202.4, subd. (d).) The court imposed a second restitution fine of \$600 pursuant to section 1202.45, which was suspended unless parole was revoked. In addition, the court imposed a \$70 AIDS education fine, and told defendant he would be on parole for up to five years after being released from prison.

On appeal, defendant argues the restitution fines must be reduced to the \$200 statutory minimum, because imposing the fines violated the terms of his plea bargain. Defendant also asserts the trial court erred in imposing the \$70 AIDS education fee, and

¹ All further references are to the Penal Code.

the five-year term of parole, because both terms are unauthorized and exceeded the court's jurisdiction. Finding the restitution fines violate defendant's plea agreement, we will modify the judgment to reduce the fines to the statutory minimum. We will also modify the judgment to strike the AIDS education fee, and reduce the period of parole supervision to three years. As so modified, we will affirm the judgment.

STATEMENT OF THE FACTS AND CASE

The facts underlying the charges are not an issue in this appeal. Therefore, we set forth only the facts relevant to defendant's plea agreement.

Defendant was charged by information with seven counts of committing a lewd act with a minor under the age of 14 years, occurring between January 8, 1995 and January 7, 1996. (§ 288, subd. (a).) The information also alleged that for counts one and seven, defendant engaged in substantial sexual conduct. (§ 1203.66, subd. (a)(8).) Count 8 of the information alleged child endangerment. (§ 273a, subd. (b).)

Prior to trial, defendant and the People entered into a plea agreement whereby defendant would plead no contest to count 1 for a three-year term in state prison. The People agreed to dismiss the remaining counts. At the time defendant entered his plea, the court advised him regarding restitution fines: "There are fines that the law requires to be imposed on a plea. In this case, there's a mandatory restitution fine of \$200, and that's imposed under section 1202.4. There's an additional restitution fine because you'll be sent to state prison, and that's required by 1202.45." The court did not advise defendant that if the sentence failed to comply with the terms of the plea bargain, he could withdraw his plea under section 1192.5.

At sentencing, the court imposed the three-year prison term the parties agreed upon. The court also ordered defendant to pay a \$600 restitution fine, and a second \$600 restitution fine was stayed unless he violated parole. In addition, the court ordered defendant to pay a \$70 AIDS education fee, and the court told defendant he would be on parole for up to five years after his release from prison.

This appeal followed.

DISCUSSION

On appeal, defendant asserts the trial restitution fines ordered pursuant to sections 1202.4 and 1202.45 must be reduced to the statutory maximum of \$200 for each fine. In addition, defendant contends the court erred in imposing the \$70 AIDS education fine, and the five-year term of parole.

Restitution Fines

In this case, although the trial court advised defendant at the time of his plea that the restitution fine would be \$200, it actually imposed a restitution fine of \$600. In addition, the court did not advise defendant pursuant to section 1192.5 of his right to withdraw his plea if his sentence did not comply with the terms of the agreement.² Relying on *People v. Walker* (1991) 54 Cal.3d 1013, defendant argues that we should reduce the amount of the fines to \$200 each.

A restitution fine is required “[i]n every case” where an individual is convicted of a felony unless the trial court finds on the record “compelling and extraordinary reasons” for not imposing the fine. (§ 1202.4, subd. (b).) The trial court has discretion to set the amount of the fine so long as it is not “less than” \$200 and “not more than” \$10,000. (§ 1202.4, subs. (b)(1), (d).) A statutory formula, which a trial court may follow,

² Section 1192.5 provides, in relevant part, as follows: “Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.”

authorizes the court to impose a restitution fine based on \$200 for every year of imprisonment, multiplied by the number of felony counts. (§ 1202.4, subd. (b)(2).)

People v. Walker, supra, 54 Cal.3d 1013 discusses the issue of restitution fines in the context of plea bargains and waiver. In *Walker*, the defendant pleaded guilty to attempted use of a destructive device in return for a five-year prison sentence with credit for time served. The trial court orally explained to defendant that “ ‘the maximum penalties provided by law for this offense are either 3 years, 5 years, or 7 years in state prison and a fine of up to \$10,000,’ . . . ” (*Id.* at p. 1019.) Although the trial court sentenced defendant in accordance with the plea bargain, the court also imposed a \$5,000 restitution fine, without objection, “although the plea agreement did not mention such a fine.” (*Ibid.*) The probation report had recommended a \$7,000 fine. The trial court did not give a section 1192.5 admonition. (*Id.* at pp. 1029-1030.)

The California Supreme Court decided that the restitution fine should be reduced to the statutory minimum. *Walker* found that “[a]bsent compliance with the section 1192.5 procedure, the defendant’s constitutional right to the benefit of his bargain is not waived by a mere failure to object at sentencing.” (*People v. Walker, supra*, 54 Cal.3d at p. 1025.) The Supreme Court also determined that the \$5,000 fine was “a significant deviation from the negotiated terms of the plea bargain” (*id.* at p. 1029), and that defendant was entitled to a remedy. It explained that “[a] violation of a plea bargain is not subject to harmless error analysis” and that “[a] court may not impose punishment significantly greater than that bargained for by finding the defendant would have agreed to the greater punishment had it been made a part of the plea offer.” (*Id.* at p. 1026.) It concluded that “[r]educing the fine to [the statutory minimum, then \$100] would . . . achieve substantial compliance with the terms of the plea bargain without violating the statutory requirement of a restitution fine.” (*Id.* at p. 1028.)

Here, defendant complains not that he was improperly advised, but that imposition of \$600 for each restitution fine violated the terms of his plea agreement. Specifically,

with regard to the restitution fines, the court advised defendant that the amount of the fine would be \$200. The court never advised defendant that it could impose a greater amount.

The People concede there was a plea bargain in this case, and that the court's imposition of the \$600 fines deviated from that bargain. However, the People argue the difference between the statutory minimum and the amount imposed is insignificant, and does not justify a reduction of the fines. While it is true the court in *Walker* suggested that an insignificant deviation would not violate the defendant's rights, the court also stressed that "[c]ourts should generally be cautious about deeming nonbargained punishment to be insignificant." (*People v. Walker, supra*, 54 Cal.3d at pp. 1027-1028, fn. 3.)

We decline to conclude that the \$600 fines imposed were not a significant deviation from the plea bargain. The amount constitutes three times the statutory minimum. Following *Walker's* cautionary note, we conclude that the \$600 restitution fine and \$600 parole revocation fine must be reduced to the \$200 statutory minimum.

AIDS Education Fee

The court imposed a \$70 AIDS education fee as a term of defendant's sentence. However, the statute to which he pleaded, section 288, subdivision (a), does not authorize such fee. Moreover, the People concede this fee was unauthorized and should be stricken. We will, therefore, strike the AIDS education fee accordingly.

Five-Year Term of Parole

At the time of sentencing, the court advised defendant that he "will be subject to a term of parole of up to five years when released [from prison]." Defendant asserts that at the time he committed his crime, the parole period for a violation of section 288, subdivision (a), was three years. (Stats. 1992, ch. 695, § 12, stats. 1993, ch. 585, § 14, eff. Oct. 1, 1993.) Currently, the parole period for a violation of section 288, subdivision (a), is five years. (Stats. 2002, ch. 829, § 1.) The application of the subsequently enacted

five-year period to defendant is a violation of the ex post facto prohibition of the United States and California Constitutions.

The People concede that imposition of a five-year period of parole for defendant's crime in this case would violate the ex post facto prohibition. However, the People correctly point out that the court merely advised defendant that he would be subject to a parole period of *up to* five years; it did not order that defendant would be subject to a five-year term of parole.

Although the court did not state that defendant would be subject to a five-year period of parole supervision, the court's comments could be misconstrued by the Department of Corrections to authorize the imposition of such term. Accordingly, we will modify the judgment to reflect a three-year term of parole supervision.

DISPOSITION

The judgment is modified to reduce the section 1202.4 restitution fine and the suspended section 1202.45 restitution fine to \$200 for each fine, and to strike the \$70 AIDS education fee. The judgment is also modified to reflect that defendant is subject to a three-year term of parole when he is released from prison.

The trial court is directed to prepare an amended abstract of judgment reflecting this modification and forward a certified copy of the amended judgment to the Department of Corrections. As modified, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

MIHARA, J.